

Frontier Law Center

Robert Starr (183052)

Adam Rose (210880)

Manny Starr (319778)

23901 Calabasas Road, Suite 2074

Calabasas, CA 91302

Telephone: (818) 914-3433

Facsimile: (818) 914-3433

E-Mail: robert@frontierlawcenter.com

adam@frontierlawcenter.com

manny@frontierlawcenter.com

Counsel for Plaintiffs

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

JODI FLOTH, and VERONICA
ESHELBY on behalf of themselves and
all others similarly situated,

Plaintiffs,

v.

TOO FACED COSMETICS, LLC,

Defendant.

Case No.

CLASS ACTION

COMPLAINT

- 1. Breach of Express Warranty**
- 2. Breach of Implied Warranty**
- 3. Violation of Consumer Legal Remedies Act**
- 4. Violation of False Advertising Law**
- 5. Violation of Unlawful Prong of the Unfair Competition Law**
- 6. Violation of the Fraudulent Prong of the Unfair Competition Law**
- 7. Violation of the Unfair Prong of the Unfair Competition Law**

JURY TRIAL DEMANDED

Plaintiffs Jodi Floth and Veronica Eshelby (“Plaintiffs”) allege the following:

NATURE OF ACTION

1. This is a prospective class action against Too Faced Cosmetics, LLC (“Defendant”) for representing that Defendant’s Better Than Sex Mascara product (the “Product”) claim has 1,944% more volume (the “Claim”). As alleged in the complaint, this claim, set forth on the product packaging is false and misleading.



7. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332(d) because there are more than 100 Class Members, the aggregate amount in controversy exceeds \$5,000,000.00, exclusive of interest, fees, and costs.

8. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because Defendant maintains its principal business in Orange County.

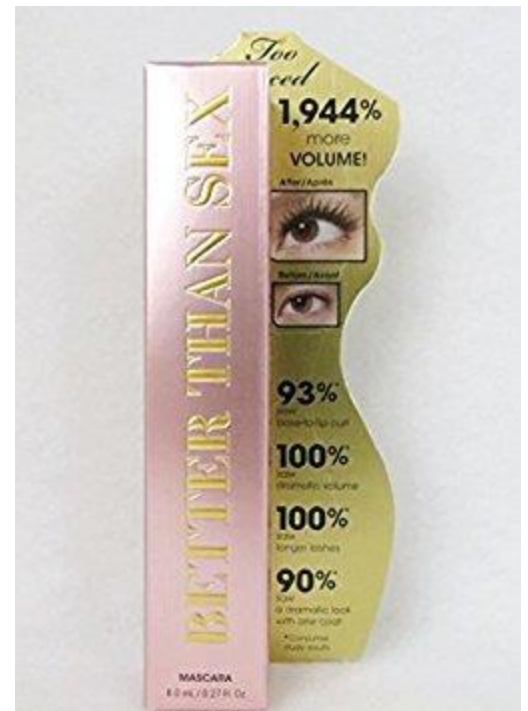
A. The Marketing and Sale of the Product

9. Mascara uses pigments, oils, waxes, and preservatives to enhance eyelashes. Mascara production is a thriving industry that was worth \$335.6 million in 2016. Into this lucrative market, Better Than Sex Mascara was launched.

8 10. The product label promises
9 consumers that Better Than Sex mascara will
provide “1,944% more volume.”

11. In addition, in its marketing and advertising materials for the Product, including but not limited to its website and YouTube channel, Defendant repeats and reinforces the 1,944% Claim.

26 12. Defendant has made and or continues to make the following
27 representations about the Better Than Sex Mascara product in support of the 1,944%
 Claim on the packaging:



- a. "1,944% more volume!* ... *results observed in a clinical study.
- b. "Don't miss out on the mind-blowing mascara that gives your lashes 1,944% more volume."
- c. "Too Faces Better Than Sex Waterproof Mascara is a sweat-proof, waterproof, play-proof mascara that gives you 1,944% more volume.** ... **clinical study results"

13. Defendant charges a substantial premium for the Product. A .027 oz. bottle of the Product sells for \$23.00 at retail, while a 0.17 oz bottle sells for approximately \$20.00. Comparable competitor's products that do not make the 1,944% Claim cost less than half as much as Better Than Sex Mascara.

14. In 2017, the National Advertising Division of the Better Business Bureau (NAD) commenced an investigation of Two Faced, amid allegations that the 1,944% claim was false and misleading, the NAD recommended that Defendant discontinue the 1,944% claim.

15. In response to the NAD's findings, Defendant stated that it would not agree to discontinue the 1,944% claim, but would stop making reference to clinical studies. Defendant further represented in writing that it would permanently discontinue an online Home Shopping Network ("HSN") video concerning the 1,944%. See <https://hsnnow.hsn.com/v/too-faced-better-than-sex-mascara-mp4/99050318/> ("HSN Video").

16. The HSN video includes false, misleading and self-described "crazy" claims concerning a 1,944% increase in volume from using Better than Sex Mascara, repeated over and over. Highlights of the HSN Video include the following exchanges:

HSN Host:	This has got a claim on it that I have never in my life in my career heard any other mascara say...
-----------	---

1 Too Faced Rep: Isn't it crazy? 1,944%! This is a study of 40 women after 3
2 coats of Better Than Sex, that is the percentage, 1,944%
3 improvement in the appearance. It's an incredible claim.

4 HSN Video at 0:35-057.

5 ***

6
7
8
9 HSN Host: 1,944% improvement in the appearance of your lashes,
10 that's crazy, I've never seen that number, that statistic. And
11 we don't just pull that out of thin air.

12 Too Faced Rep: No, we do it in the lab... and we do study after study. ...
13 That is truth it is 1,944%. It's crazy, but its true.

14 HSN Video at 4:45-5:10.

15 ***

16 HSN Host: There is simply no other mascara in the world that can say
17 1,944% improvement in the look of your lashes. It's crazy!

18 Too Faced Rep: Absolutely!

19

20

21

22

23

24

25

26

27

28

1 HSN Video at 6:03-6:16.



13 **Caption:** HSN Video Screen Shot at 1:37

14
15 17. Defendants has failed to live up to its written promise to permanently
16 discontinue the HSN Video.

17 18. On November 28, 2017, Plaintiffs sent Defendant a CLRA pre-suit
18 notice letter. Defendant never responded to the letter. Defendants did not respond to
19 the letter.

20 19. As of April 20, 2018, that video remains featured on the HSN website.
21 See <https://hsnnow.hsn.com/v/too-faced-better-than-sex-mascara-mp4/99050318/>.
22 On April 20, 2018, the National Advertising Review Board, the Appellate unit of the
23 NAD affirmed the 2017 decision. In response, the Company did not indicate that it
24 would recall the products.

25 **CLASS ACTION ALLEGATIONS**

26 20. Plaintiffs bring this action as a class action under Federal Rule of Civil
27 Procedure 23 on behalf of a Class consisting of all persons in the United States who,
28 within the relevant statute of limitations period, purchased Better Than Sex Mascara.

1 21. Plaintiffs also seek to represent a subclass defined as all members of the
2 Class who purchased Better Than Sex Mascara in California (“the California
3 Subclass”).

4 22. The Class is so numerous that joinder of all members is impractical.
5 Although Plaintiffs do not yet know the exact size of the Class, the Product is sold in
6 major retail stores across the State, including stores such as Target and Sephora. On
7 information and belief, the Class includes more than one hundred thousand members.

8 23. The Class is ascertainable because the Class Members can be identified
9 by objective criteria – the purchase of Better Than Sex Mascara during the Class
10 Period. Individual notice can be provided to Class Members “who can be identified
11 through reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B).

12 24. There are numerous questions of law and fact common to the Class
13 which predominate over individual actions or issues, including but not limited to:

- 14 (a) Whether Defendant breached an express warranty made to
15 Plaintiffs and the Class;
- 16 (b) Whether Defendant breached the implied warranty of fitness for a
17 particular purpose;
- 18 (c) Whether Defendant’s product packaging and marketing of the
19 Product is false, misleading, and/or deceptive;
- 20 (d) Whether Defendant’s marketing of the Product is an unfair
21 business practice;
- 22 (e) Whether the Product name is false and misleading;
- 23 (f) Whether Defendant was unjustly enriched by its conduct;
- 24 (g) Whether Defendant violated the CLRA;
- 25 (h) Whether Defendant violated the UCL;
- 26 (i) Whether Defendant violated the FAL;
- 27 (j) Whether Class Members suffered an ascertainable loss as a result
28 of Defendant’s misrepresentations; and

(k) Whether, as a result of Defendant's misconduct as alleged herein, Plaintiffs and the Class Members are entitled to restitution, injunctive and/or monetary relief and, if so, the amount and nature of such relief.

25. Plaintiffs' claims are typical of the claims of the members of the Class as all members of the Class are similarly affected by Defendant's wrongful conduct. Plaintiffs have no interests antagonistic to the interests of the other members of the Class. Plaintiffs and all members of the Class have sustained economic injury arising out of Defendant's violations of common and statutory law as alleged herein.

26. Plaintiffs are adequate representatives of the Class because their interests do not conflict with the interests of the Class Members they seek to represent, they have retained counsel competent and experienced in prosecuting class actions, and they intend to prosecute this action vigorously. The interests of the Class Members will be fairly and adequately protected by Plaintiffs and their counsel.

27. The class mechanism is superior to other available means for the fair and efficient adjudication of the claims of Plaintiffs and the Class Members.

First Cause of Action

Breach of Express Warranty

By All Class Members Against All Defendants

28. Plaintiffs repeat the allegations contained in the paragraphs above as if fully set forth herein.

29. Plaintiffs bring this Count individually and on behalf of the members of the Class.

30. In connection with the sale of Better Than Sex Mascara, Defendant issued express warranties including that Better Than Sex Mascara provided 1,944% more volume.

31. Defendant's affirmations of fact and promises made to Plaintiffs and the Class on Better Than Sex Mascara, which was bolstered by Defendant's advertising and public statements, became part of the basis of the bargain between Defendant on the one hand, and Plaintiffs and the Class Members on the other, thereby creating express warranties that Better Than Sex Mascara would conform to Defendant's affirmations of fact, representations, promises, and descriptions.

32. Defendant breached its express warranties because Better Than Sex Mascara does not provide 1,944% more volume.

33. Plaintiffs and the Class Members were injured as a direct and proximate result of Defendant's breach because: (a) they would not have purchased Better Than Sex Mascara if they had known the true facts; (b) they paid a premium for Better Than Sex Mascara due to the mislabeling; and (c) Better Than Sex Mascara did not have the quality, effectiveness, or value as promised.

Second Cause of Action

Breach of Implied Warranty of Fitness for a Particular Purpose

By All Class Members Against All Defendants

34. Plaintiffs repeat the allegations contained in the paragraphs above as if fully set forth herein.

35. Plaintiffs bring this Count individually and on behalf of the members of the Class.

36. Defendant marketed, distributed, and/or sold Better Than Sex Mascara with implied warranties that they were fit for the particular purpose of providing 1,944% more volume.

37. In reliance on Defendant's skill and judgment and the implied warranties of fitness for the purpose, Plaintiffs and the Class Members purchased Better Than Sex Mascara.

38. Plaintiffs and the Class Members were injured as a direct and proximate result of the breach because: (a) they would not have purchased Better Than Sex

1 Mascara if the true efficacy had been known; (b) they paid an increased price for
 2 Better Than Sex Mascara based on Defendant's representations regarding the
 3 mascara's properties and efficacy; and (c) Better Than Sex Mascara did not have the
 4 characteristics, uses, or benefits as promised. As a result, Plaintiffs and the Class
 5 Members have been damaged.

6 **Third Cause of Action**

7 **Violation of the Consumer Legal Remedies Act**

8 **By California Class Against All Defendants**

9 39. Plaintiffs repeat the allegations contained in the paragraphs above as if
 10 fully set forth herein.

11 40. Plaintiffs bring this Count individually and on behalf of the California
 12 Subclass.

13 41. Plaintiffs and the California Class Members are consumers who
 14 purchased Better Than Sex Mascara for personal, family, or household purposes.
 15 Accordingly, Plaintiffs and the California Class Members are "consumers" as that
 16 term is defined by the CLRA in Cal. Civ. Code § 1761(d). Plaintiffs and the
 17 California Class Members are not sophisticated experts with independent knowledge
 18 of the formulation or efficacy of Better Than Sex Mascara.

19 42. At all relevant times, Better Than Sex Mascara constituted a "good" as
 20 that term is defined in Cal. Civ. Code § 1761(a).

21 43. At all relevant times, Defendant was a "person" as that term is defined
 22 in Civ. Code § 1761(c).

23 44. At all relevant times, Plaintiffs' purchase of Better Than Sex Mascara,
 24 and the purchases of Better Than Sex Mascara by other Class Members, constituted
 25 "transactions" as that term is defined in Cal. Civ. Code § 1761(e). Defendant's
 26 actions, representations, and conduct has violated, and continues to violate the
 27 CLRA, because they extend to transactions that intended to result, or which have
 28 resulted in, the sale of Better Than Sex Mascara to consumers.

1 45. The policies, acts, and practices described in this Complaint were
2 intended to and did result in the sale of Better Than Sex Mascara to Plaintiffs and the
3 Class. Defendant's practices, acts, policies, and course of conduct violated the
4 CLRA §1750 *et seq.* as described above.

5 46. Defendant represented that Better Than Sex Mascara had sponsorship,
6 approval, characteristics, uses, and benefits which it did not have in violation of Cal.
7 Civ. Code § 1770(a)(5).

8 47. Defendant represented that Better Than Sex Mascara was of a particular
9 standard, quality, and grade, when it was another, in violation of California Civil
10 Code § 1770(a)(7).

11 48. Defendant violated California Civil Code §§ 1770(a)(5) and (a)(7) by
12 representing that Better Than Sex Mascara provided 1,944% more volume, when it
13 did and does not.

14 49. Defendant advertised Better Than Sex Mascara with the intent not to
15 sell it as advertised in violation of § 1770(a)(9) of the CLRA since the Better Than
16 Sex Mascara does not provide 1,944% more volume.

17 50. Plaintiffs and the Class Members suffered injuries caused by
18 Defendant's misrepresentations because: (a) Plaintiffs and the Class Members would
19 not have purchased Better Than Sex Mascara if they had known the true facts; (b)
20 Plaintiffs and the Class paid an increased price for Better Than Sex Mascara due to
21 the mislabeling of Better Than Sex Mascara; and (c) Better Than Sex Mascara did
22 not have the level of quality, effectiveness, or value as promised.

23 51. Prior to the filing of this Complaint, a CLRA notice letter was served on
24 Defendant which complies in all respects with California Civil Code § 1782(a).
25 Defendant did not respond to the letter.

26 52. Wherefore, Plaintiffs seeks damages, restitution, and injunctive relief
27 for this violation of the CLRA.
28

Fourth Cause of Action

Violation of the False Advertising Law

By California Class Against All Defendants

53. Plaintiffs repeat the allegations contained in the paragraphs above as if fully set forth herein.

54. Plaintiffs bring this Count individually and on behalf of the California Subclass.

55. California's FAL (Bus. & Prof. Code §§17500, *et seq.*) makes it "unlawful for any person to make or disseminate or cause to be made or disseminated before the public in this state, . . . in any advertising device . . . or in any other manner or means whatever, including over the Internet, any statement, concerning . . . personal property or services, professional or otherwise, or performance or disposition thereof, which is untrue or misleading and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading."

56. Throughout the Class Period, Defendant committed acts of false advertising, as defined by the FAL, by using false and misleading statements to promote the sale of Better Than Sex Mascara, as described above, and including, but not limited to, representing that Better Than Sex Mascara provided 1,944% more volume.

57. Defendant knew or should have known, through the exercise of reasonable care, that their statements were untrue and misleading.

58. Defendant's actions in violation of the FAL were false and misleading such that the general public is and was likely to be deceived.

59. As a direct and proximate result of these acts, consumers have been and are being harmed. Plaintiffs and members of the Class have suffered injury and actual out-of-pocket losses as a result of Defendant's FAL violation because: (a) Plaintiffs and the Class would not have purchased Better Than Sex Mascara if they

1 had known the true facts regarding the effectiveness of Better Than Sex Mascara; (b)
 2 Plaintiffs and the Class paid an increased price due to the misrepresentations about
 3 Better Than Sex Mascara; and (c) Better Than Sex Mascara did not have the
 4 promised quality, effectiveness, or value.

5 60. Plaintiffs bring this action pursuant to Bus. & Prof. Code § 17535 for
 6 injunctive relief to enjoin the practices described herein and to require Defendant to
 7 issue corrective disclosures to consumers. Plaintiffs and the California Class are
 8 therefore entitled to: (a) an order requiring Defendant to cease the acts of unfair
 9 competition alleged herein; (b) full restitution of all monies paid to Defendant as a
 10 result of their deceptive practices; (c) interest at the highest rate allowable by law;
 11 and (d) the payment of Plaintiffs' attorneys' fees and costs pursuant to, *inter alia*,
 12 California Code of Civil Procedure §1021.5.

13 **Fifth Cause of Action**

14 **Violation of the "Unlawful Prong" of the Unfair Competition Law**

15 **By California Class Against All Defendants**

16 61. Plaintiffs repeat the allegations contained in the paragraphs above as if
 17 fully set forth herein.

18 62. Plaintiffs bring this Count on behalf of the California Subclass.

19 63. The UCL, Bus. & Prof. Code § 17200 *et seq.*, provides, in pertinent
 20 part: "Unfair competition shall mean and include unlawful, unfair or fraudulent
 21 business practices and unfair, deceptive, untrue or misleading advertising" The
 22 UCL also provides for injunctive relief and restitution for UCL violations.

23 64. "By proscribing any unlawful business practice, section 17200 borrows
 24 violations of other laws and treats them as unlawful practices that the UCL makes
 25 independently actionable." *Cel-Tech Communications, Inc. v. Los Angeles Cellular*
 26 *Telephone Co.*, 20 Cal. 4th 163, 180 (1999) (citations and internal quotation marks
 27 omitted).
 28

65. Virtually any law or regulation – federal or state, statutory, or common law – can serve as a predicate for an UCL “unlawful” violation. *Klein v. Chevron U.S.A., Inc.*, 202 Cal. App. 4th 1342, 1383 (2012).

66. Defendant violated the “unlawful prong” by violating the CLRA, and the FAL, as well as by breaching express and implied warranties as described herein.

67. As a direct and proximate result of these acts, consumers have been and are being harmed. Plaintiffs and members of the Class have suffered injury and actual out-of-pocket losses as a result of Defendant’s UCL “unlawful prong” violation because: (a) Plaintiffs and the Class would not have purchased Better Than Sex Mascara if they had known the true facts regarding the effectiveness and contents of Better Than Sex Mascara; (b) Plaintiffs and the Class paid an increased price due to the misrepresentations about Better Than Sex Mascara; and (c) Better Than Sex Mascara did not have the promised quality, effectiveness, or value.

68. Pursuant to Bus. & Prof. Code §17203, Plaintiffs and the California Class are therefore entitled to: (a) an order requiring Defendant to cease the acts of unfair competition alleged herein; (b) full restitution of all monies paid to Defendant as a result of their deceptive practices; (c) interest at the highest rate allowable by law; and (d) attorneys’ fees and costs pursuant to Code of Civil Procedure §1021.5.

Sixth Cause of Action

Violation of the “Fraudulent Prong” of the Unfair Competition Law By California Class Against All Defendants

69. Plaintiffs repeat the allegations contained in the paragraphs above as if fully set forth herein.

70. Plaintiffs bring this Count on behalf of the California Subclass.

71. The UCL, Bus. & Prof. Code § 17200 *et seq.*, provides, in pertinent part: “Unfair competition shall mean and include unlawful, unfair or fraudulent business practices and unfair, deceptive, untrue or misleading advertising”

1 72. Defendant's conduct, described herein, violated the "fraudulent" prong
2 of the UCL because Defendant expressly and impliedly represented that Better Than
3 Sex Mascara provided 1,944% more volume. Plaintiffs and the California Class
4 Members are not sophisticated experts with independent knowledge of the
5 formulation or efficacy of Better Than Sex Mascara, and they acted reasonably when
6 they purchased Better Than Sex Mascara based on their belief that Defendant's
7 express and implied representations were true.

8 73. Defendant knew or should have known, through the exercise of
9 reasonable care, that their representations about Better Than Sex Mascara were
10 untrue and misleading.

11 74. As a direct and proximate result of these acts, consumers have been and
12 are being harmed. Plaintiffs and members of the Class have suffered injury and
13 actual out-of-pocket losses as a result of Defendant's UCL "fraudulent prong"
14 violation because: (a) Plaintiffs and the Class would not have purchased Better Than
15 Sex Mascara if they had known the true facts regarding the effectiveness of Better
16 Than Sex Mascara; (b) Plaintiffs and the Class paid an increased price due to the
17 misrepresentations about Better Than Sex Mascara; and (c) Better Than Sex Mascara
18 did not have the promised quality, effectiveness, or value.

19 75. Pursuant to Bus. & Prof. Code §17203, Plaintiffs and the California
20 Class are therefore entitled to: (a) an order requiring Defendant to cease the acts of
21 unfair competition alleged herein; (b) full restitution of all monies paid to Defendant
22 as a result of their deceptive practices; (c) interest at the highest rate allowable by
23 law; and (d) the payment of Plaintiffs' attorneys' fees and costs pursuant to, *inter*
24 *alia*, California Code of Civil Procedure §1021.5.

1 **Seventh Cause of Action**

2 **Violation of the “Unfair Prong” of the Unfair Competition Law**

3 **By California Class Against All Defendants**

4 76. Plaintiffs repeats the allegations contained in the paragraphs above as if
5 fully set forth herein.

6 77. Plaintiffs bring this Count on behalf of the California Subclass.

7 78. The UCL, Bus. & Prof. Code § 17200 *et seq.*, provides, in pertinent
8 part: “Unfair competition shall mean and include unlawful, unfair or fraudulent
9 business practices and unfair, deceptive, untrue or misleading advertising”

10 79. Defendant’s misrepresentations and other conduct, described herein,
11 violated the “unfair” prong of the UCL in that their conduct is substantially injurious
12 to consumers, offends public policy, and is immoral, unethical, oppressive, and
13 unscrupulous, as the gravity of the conduct outweighs any alleged benefits.
14 Defendant’s conduct is unfair in that the harm to Plaintiffs and the Class arising from
15 Defendant’s conduct outweighs the utility, if any, of those practices.

16 80. Defendant’s practices as described herein are of no benefit to consumers
17 who are tricked into believing Better Than Sex Mascara provides 1,944% more
18 volume.

19 81. As a direct and proximate result of these acts, consumers have been and
20 are being harmed. Plaintiffs and members of the Class have suffered injury and
21 actual out-of-pocket losses as a result of Defendant’s UCL “unfair prong” violation
22 because: (a) Plaintiffs and the Class would not have purchased Better Than Sex
23 Mascara if they had known the true facts regarding the effectiveness and contents of
24 Better Than Sex Mascara; (b) Plaintiffs and the Class paid an increased price due to
25 the misrepresentations about Better Than Sex Mascara; and (c) Better Than Sex
26 Mascara did not have the promised quality, effectiveness, or value.

27 82. Pursuant to Bus. & Prof. Code §17203, Plaintiffs, and the California
28 Class are therefore entitled to: (a) an order requiring Defendant to cease the acts of

1 unfair competition alleged herein; (b) full restitution of all monies paid to Defendant
2 as a result of their deceptive practices; (c) interest at the highest rate allowable by
3 law; and (d) the payment of Plaintiffs' attorneys' fees and costs pursuant to, *inter*
4 *alia*, California Code of Civil Procedure §1021.5.

5
6 **WHEREFORE**, Plaintiffs pray for relief and judgment, as follows:

7 A. Determining that this action is a proper class action;

8 B. For an order declaring that the Defendant's conduct violates the statutes
9 referenced herein;

10 C. Awarding compensatory and punitive damages in favor of Plaintiffs,
11 members of the Class, and the California Class against Defendant for all damages
12 sustained as a result of the Defendant's wrongdoing, in an amount to be proven at
13 trial, including interest thereon;

14 D. Awarding injunctive relief against Defendant to prevent Defendant
15 from continuing their ongoing unfair, unconscionable, and/or deceptive acts and
16 practices;

17 E. For an order of restitution and/or disgorgement and all other forms of
18 equitable monetary relief;

19 F. Awarding Plaintiffs and members the Class their reasonable costs and
20 expenses incurred in this action, including counsel fees and expert fees; and

21 G. Awarding such other and further relief as the Court may deem just and
22 proper.

23 **JURY DEMAND**

24 Plaintiffs hereby demand a trial by jury on all claims so triable in this action.

25 Dated: April 20, 2018

FRONTIER LAW CENTER

26
27 /s/ Adam Rose

28 Attorney for Plaintiffs